Supreme Court, U.S.
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NO. 85-2147

# In the Supreme Court of the United States

OCTOBER TERM, 1985

JANE DOE, ET AL

Appellants

versus

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES, OFFICE OF VITAL STATISTICS AND REGISTRAR OF VITAL STATISTICS

Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

## JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

I. Whether Louisiana's Vital Records Law or racial classification scheme is, as applied, a denial of equal protection of the law?

II. Whether Louisiana's Vital Records Law or racial classification scheme, as applied, denies due process of law?

## LIST OF PARTIES

1. State of Louisiana through the Department of Health and Human Resources, Office of Vital Statistics and Registrar of Vital Statistics;

2. Marie Bernice Guillory;

3. Armet Guillory;

4. Lucy Elizabeth Guillory;

5. Suzy-Elizabeth-Rita Guillory;

6. Regina Rougeau;

7. Tex Adam Rougeau;

8. Mildred Rougeau; and

9. Theresa Guillory.

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NO. ____

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STATE OF LOUISIANA,
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OFFICE OF VITAL STATISTICS AND
REGISTRAR OF VITAL STATISTICS

APPELLEES

---

ON APPEAL FROM
THE SUPREME COURT OF THE
STATE OF LOUISIANA

---

# JURISDICTIONAL STATEMENT

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WITH RESPECT, Jane Doe, et al, appeal to this Court in connection with the Judgments of the courts of Louisiana relative to this cause.

## OPINIONS BELOW

The opinion of the trial court, Civil District Court for the Parish of Orleans, (App. A, infra, p. 22) is not reported. The opinion of the Louisiana Court of Appeal, Fourth Circuit, (App. B, infra, p. 40), is reported at 479 So.2d 369 (La.App. 4th Cir. 1985). The opinion of the Supreme Court of the State of Louisiana (App. C, infra, p. 57) is reported at 485 So.2d 60 (La. 1986).

## JURISDICTION

This is an appeal from a final judgment of the highest court of the State of Louisiana affirming the judgment of the appellate court which held that the state statute requiring racial designation on vital records, specifically birth certificates, was not, as applied, repugnant to the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution.

Jurisdiction is based on 28 U.S.C. §1257(2).

## CONSTITUTIONAL, STATUTORY AND CASE LAW INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

At the time of trial, Louisiana's racial classification scheme consisted of the following statutes and case law:

1. LSA-R.S. 40:34(1)(k) provided in pertinent part as follows:

> (1) Contents of Birth Certificate. The certificate of birth shall contain, as a minimum, the following items:
>
> . . .

(k) race or races of parents.

2. LSA-R.S. 40:61(A)(1) provides:

> A. A fine of not more than $10,000.00 or imprisonment of not more than 5 years, or both, shall be imposed upon:
>
> (1) any person who willfully and knowingly makes any false statement in a certificate. . .required by this Chapter.

3. LSA-R.S. 42:267 (repealed by Acts 1983, No. 441 §1) provided in pertinent part as follows:

> In signifying race, a person having one thirty-second or less of Negro blood shall not be deemed, described or designated by any public official in the state of Louisiana as "colored," a "mulatto," a "black," a "negro," a "griffe," an "Afro-American," a "quadroon," a "mestizo," a "colored person" or a "person of color."

4. The Supreme Court of the State of Louisiana stated the following with regard to LSA-R.S. 42:267:

> A reasonable explanation of the legislative purpose of the Act is that it was a definition, not of the terms indicated in the title, but of the phrase "traceable amount," formerly of legal significance in racial designation in this State. . .. Louisiana is now prohibited, by R.S. 42:267, from designating as "Negro" those persons with only a "traceable amount" of Negro blood.

5. The Supreme Court of the State of Louisiana stated the following with regard to the definition of colored or Negro:

> The word "colored" as used in the statute [the same statute that was at issue in Plessy] is a term specifically applied in the United States to negros or persons have an admixture of negro blood. . .

Act No. 111 of 1890 draws a sharp line of distinction, without a margin, between the white and colored races. . . . Ever since the first settlement of Louisiana all persons with any appreciable degree of negro blood have been considered as colored; that is to say, as belonging to the African race. Many free persons of color own slaves and other property. But between that class of people, however light in color, and the whites, the color line was strictly drawn, both socially and politically. The lawmaker never applied the term "colored" to slaves, but since emancipation that term has been used as synonymous with negro. Among slaves the word "negro" or "nigger" was considered as a term of reproach, and they usually spoke of themselves as "colored". This nomenclature has survived, and has become a popular term, embracing all persons of negro blood. Lee, et al v. New Orleans Great Northern R. Co., 125 La. 235, 238-239, 51 So.2d 182 (La. 1910).

6. The Louisiana Supreme Court has outlined the Standard of Proof applicable in changes of racial data of Louisiana's vital records as follows:

> . . .In order to justify a change in birth registration, the evidence must leave no room for doubt. State ex rel Plaia v. Louisiana State Board of Health, 296 So.2d 809, 810 (La. 1974).

The no room for doubt standard was legislatively overruled in 1983 upon the passage of LSA-R.S. 40:60(E) which states that the preponderance of the evidence standard would be applicable in cases involving amendments to vital records.

## STATEMENT OF THE CASE

Upon learning in 1977 that her birth certificate contained the designation of "Col." ("colored") as the race of her mother and father, Susie Guillory Phipps filed a Petition for a Writ of Mandamus to obtain a court order directed to the State of Louisiana, Department of Health and Human

Resources, Office of Vital Statistics, and Registrar of Vital Statistics to have the designations changed to "white". Subsequently, other members of the Guillory family joined Ms. Phipps to have their racial designations changed or designated as "white".

The matter came for trial on the 14th day of September 1982 and lasted for three (3) days. Ms. Phipps attempted to rebut the statutory presumption that the racial designations on her birth certificate were correct and, in the alternative, also challenged the constitutionality of Louisiana's racial classification scheme on its face and as applied.

Extensive and exhaustive evidence was introduced through testimony of experts in genetics, anthropology and genealogy as well as testimony and other exhibits regarding the lineage of Ms. Phipps and her relatives. Through a chain of historical records, the State traced Ms. Phipps' lineage

back to a person named Marguerite, purportedly a "full blooded negress", who was involved with two of the earliest Louisiana cases involving race entitled: A Criminal Prosecution Brought by Claudio Guillory against Migue Barre, to Recover a Negress Slave, Marguerite and Margurerite, A Free Negress v. The Guillory Heirs, reported in the Spanish judicial records dated 20 January 1781 and 9 March 1782, respectively. Translations from the Spanish were introduced at trial.

Based on a "Visual Percentage Analysis Chart", the State purported to calculate that Ms. Phipps' father had 4.25 thirty-seconds or 13.28125 percent "Negro blood" and that her mother had 6.75 thirty-seconds or 21.09375 persent "Negro Blood" which meant that Ms. Phipps had 5.5 thirty-seconds or 17.1875 percent "Negro blood" which made her under the prevailing legal definition a "Negro".

Appellant's introduced uncontradicted evidence that as a matter of genetic science it is impossible to measure the amount of racial genes received by an individual because of the random distribution of genes from one generation to the next. Since it is impossible to measure an individual's racial or genetic make-up, it is certainly not subject to mathematical computation.

The trial court held that Ms. Phipps and her relatives did not prove they are white and, further, that the Louisiana racial classification scheme was constitutional. (See, App. A, infra, p. 37-38).

On 18 October 1985, the intermediate appellate court for the Louisiana Court of Appeals, Fourth Circuit, overruled the "no room for doubt" standard of proof, but nonetheless held that appellants who had birth certificates had not proven at trial by a preponderance of the evidence that the

racial classifications on the birth certificates were incorrect. The two (2) appellants without birth certificates were not entitled to certificates designating them "white". The Appellate Court also upheld the constitutionality of Louisiana's racial classification scheme. (See, App. B, infra, p. 55-56).

On 31 March 1986, the Louisiana Supreme Court declined to review the holding of the intermediate Appellate Court's decision. (See, App. C., infra, p. 57).

On 30 April 1986, appellants filed in the trial court and Louisiana Supreme Court notices of appeal to the United States Supreme Court. (See, App. D and E, infra, pp. 59, 61).

THE QUESTIONS ARE SUBSTANTIAL

Since the founding of New Spain in the Sixteenth Century, caucasians have strenuously maintained the separation of the races. At first, there were but sixteen

Spanish categories of racial admixture (combinations of white, indian and negro) which later expanded to one hundred sixty-four categories, until thereafter the Spanish colonialists abandoned the effort.

The banner was thereafter carried by the French, British and, finally, the Americans. In all cases, the presence of negro ancestry, however determined, relegated that individual to a lesser social caste. Though the various states used different formulae, the desired and ultimate end was to keep the races separate, and all doubts relative to the purity of one's white ancestry were resolved in favor of inclusion in the inferior group.

Racial classification is a fundamental aspect of the evolution of civil rights in American history. This evolution started with the institution of slavery, proceeded to the Emancipation Proclamation, the passage of the Fourteenth Amendment, the

Jim Crow era, the Civil Rights Act of 1964 and finally the reverse discrimination practice of today. However, the criteria for inclusion in any particular racial group has never been squarely met by this Court, even though an opportunity arose prior to the beginning of the Twentieth Century in Plessy v. Ferguson, 163 U.S. 537 (1896):

> It is true that the question of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is difference of opinion in the different states; some holding that any visible admixture of black blood stamps the person as belonging to the colored races. . .; others, that it depends on the preponderance of the blood. . .; and still others, that the predominance of white blood must only be in the proportion of 3/4ths. . .. But these are questions to be determined under the laws of each state and are not properly put in issue in this case. Under the allegations of his Petition, it may

> undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race. Plessy, at 549, 552. [emphasis supplied]

The means by which one is included in a particular racial group has great impact on the question of whether whites and blacks receive equal protection of the law. Under the law of Louisiana, one with either a traceable amount or, prior to 1983, more than one thirty-second of "Negro Blood", is classed as negro; however, if one has a traceable amount or more of "White Blood", he is still classed as a negro, unless, of course, the mixture is Caucasian and Oriental, in which case the individual would be classed as white.

Appellants strenuously argue that racial classification, the obvious basis for any action relative to special treatment for members of a particular racial group, has been and certainly is now a "question of

importance" and is sufficiently substantial to justify this Court's focus of its full attention on the constitutional aspects of the Louisiana Vital Records law.

Under recent jurisprudence, the Supreme Court has held that the Constitution need not be color blind. See, e.g., Regents of University of California v. Bakke, 438 U.S. 265 (1970). This court has said that there might be limited room under the Equal Protection Clause for civil law requiring the keeping of racially segregated public records for statistical and other valid public purposes. McLaughlin v. State of Florida, 379 U.S. 194, 198 (1964). If the United States Constitution allows the keeping of racially segregated records, then it is perforce necessary that there be articulated a constitutionally permissible definition of negro (or white), a criteria by which an individual may be classed as one or the other. The substantial question before

this Court is whether or not Louisiana's methodology, which classifies those with a traceable amount of negro blood as negro and yet does not classify those with a traceable amount of white blood as white, is acceptable under the present status of the law. Indeed, the question becomes whether or not the Louisiana Vital Records Law stigmatizes a discreet minority as inferior and perpetuates past discrimination. This approach has figured prominently in Louisiana jurisprudence.[1/]

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1/ Adelle v. Beauregard, 1 Mart. O.S. 183 (La. 1810); Jamison v. Bridge, 14 La.Ann. 31 (La. 1859); Morrison v. White, 16 La.Ann. 100 (La. 1861); Ex parte Plessy, 45 La.Ann. 80 (La. 1893), aff'd Plessy v. Ferguson, 163 U.S. 537 (1896); Lee v. New Orleans Great Northern Co., 125 La. 236 (La. 1910); Neuberger v. Guildner, 139 La. 758 (La. 1916); Sunseri v. Cassagne, 185 So. 1 (La. 1938); Villa v. Lacoste, 35 So.2d 419 (La. 1948); Ryan v. Barthelmy, 32 So.2d (La.App. 1st Cir. 1947); State ex rel Treadway v. Louisiana State Board of Health, 54 So.2d 343 (La.App. Orl. 1951), reh'g granted 56 So.2d 249, aff'd, 61 So.2d 735 (La. 1952); Green v. City of New Orleans, 88 So.2d 76 (La.App.Orl. 1956); State ex rel Cousins v. Louisiana State Board of Health, 138 So.2d 829 (La.App. 4th Cir. 1962);

The Louisiana Vital Records law does provide a procedure for the correction racial designations. Regardless of appearance or acceptance in the community, such a person has been required to prove either that he has no traceable amount of negro ancestry or, prior to 1983, less than one

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1/ State ex rel Lytell v. Louisiana State Board of Health, 153 So.2d 498 (La.App. 4th Cir. 1963); State ex rel Heno v. Drake, 176 So.2d 226 (La.App. 4th Cir. 1965); State ex rel Francis v. Louisiana State Board of Health, 179 So.2d 681 (La.App. 4th Cir. 1965); State ex rel Pritchard v. Louisiana State Board of Health, 198 SO.2d 490 (La.App. 4th Cir. 1967); State ex rel Schlumbrecht v. Louisiana State Board of Health, 231 So.2d 730 (La.App. 4th Cir. 1970); Thomas v. Louisiana State Board of Health, 278 So.2d 915 (La.App. 4th Cir. 1973); Messina v. Ciaccio, 219 So.2d 339 (La.App. 4th Cir. 1974); State ex rel Plaia v. Louisiana State Board of Health, 275 So.2d 201 (La.App. 4th Cir. 1973), aff'd in part, rev'd in part, 296 So.2d 809 (La. 1974); Jane Doe, et al v. Louisiana, through the Department of Health and Human Re sources, Office of Vital Statistics and Registrar of Vital Statistics, 479 So.2d 369 (La.App. 4th Cir. 1985), cert. den. 485 So.2d 60 (La. 1986). This list is not intended to be nor is it exhaustive. Many other Louisiana cases have implicitly involved the definition of race. See, e.g., New Orleans Park Development Association v. Detiege, 358 U.S. 54 (1958); Lombard v. Louisiana, 337 U.S. 267 (1963); Brown v. Louisiana, 383 U.S. 131 (1966).

thirty-second of black blood. When this case was tried, the standard of proof was "no room for doubt"; it is now proof by a preponderance of the evidence.

Genetic distribution is similar to a hand in a bridge game. One may, over the course of an evening, expect 25% of each suit when all are added together and divided by the number of hands dealt. In any given hand, however, one may get all of one suit, an even distribution approximating each of the four possibilities or any variation in between. Thus, it is impossible to determine, by reference to the race of one's ancestors, assuming these designations accurate, the genetic "deal" given to any particular individual. So, then, one seeking to alter a birth certificate's racial designation to conform to appearance and community reputation is faced with proving lack of any negro blood, a scientific impossibility, regardless of the standard of proof imposed.

A right to sue without any expectation of a just remedy is meaningless in this context. This empty, impossible remedy denies Due Process of law. c.f., Boddie v. Conneticut, 401 U.S. 371 (1971).

One may hear those who say that racial appearance based on self image will occasion an avalanche of Caucasians changing their racial designations to negro so as to obtain the benefits of reverse discrimination, minority participation in government contracts, affirmative action and other programs designed to aid blacks. Though it is doubtful that this would occur, it may in isolated cases. However, it is anticipated that people would proceed to accept the racial group with which they are identified and no wholesale changes are likely to occur. Indeed, there are in this country many pheontypically Caucasian persons classed as black who enjoy those benefits and who

may well neither need nor deserve them. Further, there are many poverty striken people of all races, whose welfare and very severe problems should be the focus of our national concern and energy.

The Louisiana Vital Records law, or racial classification scheme, serves no purpose, compelling or otherwise, and is enforced by criminal sanctions. This Louisiana racial classification scheme is clearly directed at keeping all those with the least black heritage classified as black and provides an empty legal procedure to keep them so classified. It is doubtless that the Louisiana racial classification scheme treats the races unequally and therefore denies equal protection of the law. It is equally clear that the empty remedy provided under Louisiana's jurisprudence denies due process of law, also guaranteed by the

Fourteenth Amendment. Thus, this matter deserves the full review of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been forwarded to all counsel of record by depositing a copy of same in the United States mail, postage prepaid and properly addressed, this ___ day of _____, 1986.

BRIAN M. BEGUE

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 78-9513 c/w 81-4201 DIVISION "D"(S) DOCKET NO.

JANE DOE, ET AL

VS.

STATE OF LOUISIANA through DEPARTMENT OF HEALTH AND HUMAN RESOURCES, OFFICE OF VITAL STATISTICS and REGISTRAR OF VITAL STATISTICS

CONSOLIDATED WITH

SUSIE SMITH, ET AL

VS.

STATE OF LOUISIANA through DEPARTMENT OF HEALTH AND HUMAN RESOURCES, OFFICE OF VITAL STATISTICS and REGISTRAR OF VITAL STATISTICS

In these two consolidated suits, relators seek, by mandamus, to compel the State of Louisiana, through the Department of Health and Human Resources, to issue to them birth certificates, or delayed birth certificates, showing their race as "white". Alternatively, relators seek to have R.S. 42:267 declared unconstitutional.

APPENDIX "A"

Relators, as their names are shown on their birth certificates, are:

1) Marie Bernice Guillory, born January 13, 1919, daughter of Dominique Guillory and Simea Fretty. Both parents are shown to be colored on the certificate. The certificate was filled out by Mrs. O. Sonnier, midwife.

2) Armet Guillory, born October 15, 1928, daughter of Domminic Guillory and Samye Fredey. Both parents are shown to be colored on the certificate. The certificate was filled out by Mrs. Mary Ann Lee, midwife.

3) Lucy Elizabeth Guillory, born January 29, 1932, daughter of Dominic Guillory and Semea Fratty. Both parents are shown to be colored on the certificate. The certificate was signed by Lassine Hobert, midwife.

4) Suzy-Elizabeth-Rita Guillory, born April 13, 1934, daughter of Dominic Guillory and Simea Fritty. Both parents are shown to be colored on the certificate. The

certificate was filled out by Mrs. Lezume Hebert, midwife.

5) Regina Rougeau, born June 14, 1939, daughter of Adam Rougeau and Treasure Guillory. Both parents are shown to be colored on the certificate. The certificate is signed by the mark of Martha Lewis, midwife.

6) Tex Adam Rougeau, born October 16, 1941, son of Adam Rougeau and Theresa Guillory. Both parents are shown to be colored on the certificate. The certificate was filled out and signed by Eveline Griffith, midwife.

The two other relators were never issued birth certificates, and now seek delayed birth certificates showing their race to be "white". They are:

7) Mildred Rougeau, sister of Regina Rougeau and Tex Adam Rougeau, and daughter of Theresa Guillory, who is the sister of the first four named relators; and

8) Theresa Guillory, mother of Regina, Tex Adam and Mildred Rougeau, and sister of the first four named relators.

Since birth certificates in Louisiana do not show the race of the child, but rather race of the parents, any alteration of the certificate can be made only as to the race of the parents.

Relators' basic positions on the merits of the case seem to be (1) that because the State is the custodian of the vital statistics records, and because the relators have no control over the racial designations made therein, it is unreasonable and unfair to place on relators the burden of proving any inaccuracies; and (2) that a person commonly accepted as "white" should not be designated as "colored" unless the evidence leaves no room for doubt.

The term "colored" is generally accepted to apply to a person with Negro blood or with some admixture of Negro blood,

although it has been applied to a person of some race other than white. This is true of the dictionary definitions of the word as well as in the jurisprudence. See Lee v. New Orleans Great Northern R. Co., 125 La. 236, 51 So. 182 (1910); State v. Louisiana State Board of Health, 179 So.2d 681 (La.App. 4th Cir. 1965); Webster's Third New International Dictionary; Black's Law Dictionary.

The term "white" is defined in Webster's Third New International Dictionary as "belonging to a racial group or subdivision of a racial group characterized by reduced skin pigmentation, typically represented by the European Caucasoids, and usu. specif. distinguished from persons belonging to groups marked by black, brown, yellow, or red skin coloration", or "being of white ancestry either wholly unmixed with Negro blood or having an admixture of Negro blood less than that specified in various statutes of some states of the U.S."

Relevant to this litigation in the State Vital Statistics Law, R.S. 40:32 et seq., which provides for the preparation, maintenance and preservation of records pertaining to birth, marriage, adoption, abortion and death. Since originally enacted in 1918, the law has been extensively amended and expanded, but, for purposes of this litigation, will be considered in its present form, as last amended by Act 776 of 1979, since no changes of substance affecting the issues here presented have been made since the filing of the first of these suits in 1978.

R.S. 40:33 provides for the establishment of one central office for the vital records of this state, headed by a registrar, who is charged with the responsibility of carrying out the mandates of the Vital Statistics Law.

R.S. 40:34 provides for the preparation of forms for the maintenance of vital

statistics records, and prescribes the minimum contents thereof, including the birth certificate. Subsection A(1)(k) thereof provides that the birth certificate contain the race or races of the parents. This has been a requirement of the law since the enactment of Act 267 of 1918.

R.S. 40:36 makes the state registrar the custodian of all vital certificates, and charges him with the responsibility of gathering, storing, and maintaining all of such records.

R.S. 40:39, which was enacted for the first time in 1979, after the first suit was filed, but before the second, provides for a short form birth certificate which does not disclose the racial designation of the parents.

R.S. 40:41A provides that, except for delayed or altered certificates, "every original certificate on file in the division of vital records is prima facie evidence of

the facts therein stated." Former R.S. 40:40, from Act 352 of 1976, which was in effect when the first suit was filed, is to the same effect.

Section 13 of Act 257 of 1918 which was in effect when all the birth certificates herein were filed, places the responsibility for filing the certificate on the physician or midwife attending the birth. In each case presented herein the certificate was filled out by a midwife, and the certificates have been held in the files of the State Registrar, without alteration, since each was filed.

Alterations to any certificate on file, or the issuance of a delayed certificate by the state registrar are governed by R.S. 40:59 and R.S. 40:60, which provide:

> R.S. 40:59. The acceptance for filing by the state registrar of any certificate more than six months after the time prescribed for its filing and any alteration of any certificate after it is filed with the state registrar is subject to regulations in which

the secretary of the Department of Health and Human Resources shall prescribe in detail the proofs to be submitted by any applicant for delayed filing or for any alteration of a certificate.

R.S. 40:60.

A. Certificates accepted for filing more than six months after the time prescribed for their filing and certificates which have been altered after being filed with the state registrar shall contain the date of the delayed filing or the date of the alteration and be marked distinctly "delayed" or "altered".

B. After a certificate has been accepted for delayed filing or after a certificate on file has been altered, the state registrar shall note on the certificate a summary statement of the evidence submitted in support of the acceptance for delayed filing or the alteration, together with the alteration made.

C. Evidence affecting delayed certificates or affecting the alteration of a certificate after it has been filed with the state registrar shall be kept in a special permanent file.

D. Upon receipt of a certified copy of an order of a court of competent jurisdiction changing the name of a person born in this state and upon request of such person or if a minor of both his

parents, guardian or legal representative, the state registrar shall amend the certificate of birth to show the new name on the original certificate.

E. When an applicant does not submit the minimum documentation required in the regulations for amending a vital record or when the state registrar has reasonable cause to question the validity or adequacy of the applicant's sworn statements or the documentary evidence, and if the deficiencies are not corrected, the state registrar shall not amend the vital record and shall advise the applicant of the reason for this action and shall further advise the applicant of the right to seek a court order in a mandamus proceeding against the state registrar of vital records in a Louisiana court of competent jurisdiction at the domicile of the division of vital records.

F. To protect the integrity of vital records and to prevent the fraudulent use of birth certificates of deceased persons, the state registrar is hereby authorized to match birth and death certificates, in accordance with written standards promulgated by the secretary of the Department of Health and Human Resources to prove beyong a reasonable doubt the fact of death, and to stamp "deceased" and date the appropri-

ate birth certificate. Copies issued from birth certificates marked deceased shall be similarly marked.

There is nothing in this record to indicate that plaintiffs have attempted to follow the procedure above set forth or those which were in effect in 1978, which were substantially the same. See former R.S. 40:57 and 58. Neither does the record contain any regulations pertaining to the proofs to be submitted in support of an application for alteration or delayed issuance. However, no objection has been raised by defendant. I further note that mandamus, which ordinarily will not lie to compel the performance of a discretionary functions, is expressly permitted by R.S. 40:60E.

The above statutory provisions, particularly R.S. 40:41A and R.S. 40:59 and 60 clearly place the burden of proving the propriety of an alteration on the person seeking to have it made. In State ex rel. Schlumbrecht v. Louisiana St. Bd. of H.,

231 So.2d 730 (La.App. 4th Cir. 1970) writ ref. 256 La. 69, 235 So.2d 97, there is a review of the jurisprudence relative to the extent of the burden of proof, which is summarized as to the effect "that in order to justify a change in birth registration, the evidence must leave 'no doubt at all'". See also State v. Louisiana State Board of Health, 296 So.2d 809 (La. 1974). The rule has been criticized as too stringent (XXIX La.L.Rev. 310) and relators contend herein that the entire burden of proof should be borne by the State. The State suggests that a "preponderance of the evidence standard" would be more reasonable. Whatever the merits of these contentions, I find the rule to be well established in our jurisprudence at both appellante levels, and will apply it herein. Relators' contention that, because they appear to be "white", the State must prove otherwise, is without legal foundation.

In this case, it is entirely clear that the relators have the appearance of "white" people. They have fair skins and, in some cases, blue eyes and blond hair. It is also entirely clear that they are of mixed white and negro blood. With respect to the five Guillory siblings, it is equally apparent that they were considered in their community as colored; that they sat on the colored side of the aisle in church; that they attended a colored school; and that many of their close relatives consider themselves to be colored. It is further clear that some members of the Guillory and Rougeau families live as white people and hold white birth certificates.

In evidence are detailed genealogical charts, supported by birth, death, and marriage records, both from official sources and from the churches attended by the families, as well as school and census records. It is argued that, because of the inexact

meaning of negro, mulatto, quadroon, colored, gens de couleur and other similar terms used in these records, it is impossible to conclude exactly the degree of negro blood in relators' veins. I agree that it is not possible from the evidence to establish the exact degree of negro blood in relators' veins. Scientific evidence in the record is to the effect that, although it is probable that an individual inherits equally the genes of his ancestors, it is possible for the grandchild of a person to inherit no genes whatsoever from that person, so that the grandchild of three white persons and a negro could have no negro genes whatsoever.

Six of the relators have birth certificates, filled out by midwives who delivered them at birth, and filed as provided by law. The law further provides that the recitations therein are prima facie correct, and can be altered by the state

registrar only when shown to be incorrect beyond any doubt. Relators have not borne this burden of proof.

I therefore hold that relators are not entitled to the relief sought, i.e., to have the racial designations of their parents changed from "colored" to "white" on their birth certificates. I might add that the nature of the evidence is such that, if relators were attempting to have their racial designations changed form "white" to "colored", they would not be entitled to that relief either. That is, the evidence is not sufficient to show, beyond a doubt, that a racial designation of "white" would be incorrect. However, so long as the recitations of the certificates are deemed to be prima facie correct, and so long as evidence sufficient to prove an inaccuracy "beyond a doubt" is reuiqred to compel a change, such anomalies will continue to

registrar only when shown to be incorrect beyond any doubt. Relators have not borne this burden of proof.

I therefore hold that relators are not entitled to the relief sought, i.e., to have the racial designations of their parents changed from "colored" to "white" on their birth certificates. I might add that the nature of the evidence is such that, if relators were attempting to have their racial designations changed form "white" to "colored", they would not be entitled to that relief either. That is, the evidence is not sufficient to show, beyond a doubt, that a racial designation of "white" would be incorrect. However, so long as the recitations of the certificates are deemed to be prima facie correct, and so long as evidence sufficient to prove an inaccuracy "beyond a doubt" is required to compel a change, such anomalies will continue to exist.

As to the alternative pleas of unconstitutionality of R.S. 40:34 A(1)(k) and R.S. 42:267, I find them to be without merit.

There is nothing inherently discriminatory in showing the race of a child's parents on his birth certificate. Nor can it be doubted that legitimate and useful statistics, relating to problems of health, population and discrimination can be derived therefrom. It must further be remembered that the information on the certificates is generally derived from the parents themselves or from family members, and is not placed thereon by the State.

As to R.S. 42:267, it has already been found constitutional by our Supreme Court, in State v. Louisiana State Board of Health, 296 So.2d 809 (La. 1974).

Accordingly, I will sign, when presented to me, judgments in favor of

defendants and against relators, dismissing both proceedings, with all costs to be paid by relators.

New Orleans, Louisiana May 18, 1983

/§/ Federick Ellis
JUDGE

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 78-9513 c/w 81-4201 DIVISION "D"(S) DOCKET NO.

JANE DOE, ET AL

VS.

STATE OF LOUISIANA THROUGH DEPARTMENT OF HEALTH AND HUMAN RESOURCES, OFFICE OF VITAL STATISTICS and REGISTRAR OF VITAL STATISTICS

CONSOLIDATED WITH

SUSIE SMITH, ET AL

VS.

STATE OF LOUISIANA THROUGH DEPARTMENT OF HEALTH AND HUMAN RESOURCES, OFFICE OF VITAL STATISTICS and REGISTRAR OF VITAL STATISTICS

FILED: _____ _____
DEPUTY CLERK

JUDGMENT

These two consolidated cases were tried on September 13th, 14th and 15th, 1982.

PRESENT: BRIAN M. BEGUE, ESQ. and
RANDALL K. BROOKS, ESQ.
Attorneys for the Plaintiffs

H.M. WESTHOLZ, JR., ESQ.
Counsel for the Defendants,
Louisiana Department of Health
and Human Resources, et al

and

RONALD DAVIS, ESQ.
Attorney for Defendant,
State of Louisiana

After the conclusion of the trial, the Court ordered the submission of post trial memoranda and the case was taken under advisement. The Court now concluding that the law and the evidence are in favor of the defendants for the reasons assigned in the written opinion of this Court filed in the record on May 18, 1983;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment rendered in favor of the defendants, the Louisiana Department of Health and Human Resources, Office of Vital Statistics and Registrar of Vital Statistics and the State of Louisiana and against the plaintiffs, Marie Bernice Guillory, Armet Guillory, Lucy Elizabeth Guillory, Suzy Elizabeth Rita Guillory,

Regina Rougeau, Tex Adam Rougeau, Mildred Rougeau and Theresa Guillory dismissing both of the consolidated pleadings and all demands of the petitioners therein with all costs to be paid by the plaintiffs.

JUGMENT READ AND SIGNED in open court in New Orleans, Louisiana, this 18th day of May, 1983.

/§/ Frederick Ellis
JUDGE

| | |
|---|---|
| JANE DOE | NO. CA-1120 |
| VERSUS | COURT OF APPEAL |
| STATE OF LOUISIANA THROUGH THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES, OFFICE OF VITAL STATISTICS AND REGISTRAR OF VITAL STATISTICS | FOURTH CIRCUIT<br>STATE OF LOUISIANA |

APPEAL FROM THE CIVIL DISTRICT COURT, PARISH OF ORLEANS, NOS. 78-9513 c/w 81-4201, DIVISION "D", HONORABLE FREDERICK ELLIS

* * * * * * * * * * *

CHARLES R. WARD
JUDGE

* * * * * * * * * * *

Court composed of Judges William H. Byrnes, III, Charles R. Ward, Joan Bernard Armstrong

(ARMSTRONG, J., concurring in part and dissenting in part with reasons)

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OCT 18 1985

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APPENDIX "B"

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AFFIRMED

This appeal is brought by several members of the Guillory family, children and granchildren of Simea Fretty and Dominique Guillory, both deceased. Six of the appellants, Marie Bernice Guillory Rougeau, Armet Guillory Fontenot, Lucy Elizabeth Guillory Parker, Suzy Elizabeth Rita Guillory Phipps, Regina Rougeau, and Tex Adam Rougeau, contend that their birth certificates, issued between the years 1919 and 1941, erroneously designate their parents as "colored", when in fact they were white. These appellants seek a mandamus that would compel the Louisiana Department of Health and Human Resources

to correct the alleged error. Two of the appellants, Theresa Guillory Rougeau and Mildred Rougeau, were never issued birth certificates. They seek a mandamus compelling the state to issue delayed birth certificates designating their parents as white. The Trial Court found that the evidence presented by appellants was insufficient to justify a mandamus.

As an alternative to their suit for mandamus, appellants challenged the constitutionality of former La. R.S. 42:267[1]

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[1]The statute read:

> In signifying race, a person having one-thirty second or less of Negro blod shall not be deemed, described or designated by any public official in the state of Louisiana as "colored," a "mulatto," a "black," a "negro," a "griffe," an "Afro-American," a "quadroon," a "mestizo," a "colored person" or a "person of color."

[enacted Acts 1970, No. 46; repealed Acts 1983, No. 441] which provided that a person having one-thirty second or less of Negro blood shall not be described or designated as "colored" by any state official. The Trial Court rejected the constitutional challenge solely on the grounds that 42:267 was held constitutional in State ex rel. Plaia v. Louisiana State Board of Health, 296 So.2d 809 (La. 1974).

We affirm the Trial Court judgment.

Mandamus is an extraordinary remedy which is granted only upon a clear showing that a public officer has a legal duty to do what is demanded of him. La. C.C.P. art. 3863. Thus, the first question we must answer is whether the defendant public officers in this case have a legal duty to designate appellants' parents as white on their birth certificates.

We do not believe such a duty exists because the racial designations at

issue are not those of appellants but those of their parents. Appellants have not been racially classified, either pursuant La. R.S. 42:267 or otherwise. We do not believe that an individual may change the racial designation of another person, whether his parent or anyone else. The appellants might today describe themselves as white does not prove error in a documents which designates their parents as colored. This anomaly shows the subjective nature of racial perceptions but does not give appellants a cause of action to alter it.

However, even assuming that appellants have a right to change what they allege are incorrect designations, the state has a duty to make the changes only if appellants have shown that white is the correct designation.

Although prior jurisprudence[2] seems to apply a high burden of proof, we view the evidence presented in support of appellants' claim under the preponderance of the evidence standard. That standard is applied to most factual determinations in civil cases and is the standard presently used in mandamus proceedings for altering vital records. La. R.S. 40:60(E). Moreover, a careful reading of prior cases reveals that imposition of a higher burden of proof was based on the appellate courts' misinterpretation of earlier supreme court cases. See G. Pugh, Louisiana Evidence Law 520 (1974). To the extent those cases are

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[2] Sunseri v. Cassagne, 191 La. 209, 185 So. 1 (1938); State ex rel. Treadaway v. Louisiana State Board of Health, 221 La. 1048, 61 So.2d 735 (1952); Green v. City of New Orleans, 88 So.2d 76 (La.App. Orl. 1956); State ex rel Schlumbrecht v. Louisiana State Board of Health, 231 So.2d 730 (La.App. 4th Cir. 1970).

inconsistent with the standard enunciated here, they are disapproved.

The voluminous record before us contains fascinating evidence of race as a matter of physical appearance, heredity, self-perception, community recognition, and cultural bias. The record includes trial testimony of Suzy Guillory Phipps, one of the original plaintiffs, depositions of elderly relatives and neighbors of the Guillory family, testimony of state employees who register and maintain vital statistics, and expert testimony of genealogists and a geneticist. Also in evidence are detailed genealogical charts supported by official and unofficial records spanning some two hundred years, along with photographs of scores of Guillory family members.[3] The intriguing historical, social and anthro-

---

[3] We have not overlooked appellants' several assignments of error regarding the admissibility of certain items of this evidence. We find, however, that our opinion would not be changed by exclusion of that evidence to which appellants object.

pological issues raised by this evidence belie simple legal questions--the only questions courts of law are authorized or indeed able, to answer.

As to the six appellants who presently have birth certificates, we find that they failed to prove by a preponderance of the evidence that their parents' racial designations are incorrect. Expert testimony indicated that the very concept of the racial classification of individuals, as opposed to that of a group, is scientifically insupportable. Individual racial designations are purely social and cultural perceptions, and the evidence conclusively proves those subjective perceptions were correctly recorded at the time appellants' birth certificates were issued. There is no proof in the record that Simea or Dominique Guillory preferred to be designated as white. They might well have been proud to be described as colored. Indeed, we have no evidence

that during their lifetimes they objected to the racial designations in dispute in this case. Accordingly, we hold that the defendant state officer have no legal duty to alter the birth certificates.

As to those appellants who have no birth certificates, their claim for mandamus was correctly denied since the record does not show that they have applied for or been refused delayed birth certificates pursuant to La. R.S. 40:59-60.

Finally, we conclude that the now infamous "one-thirty second" statute, La. R.S. 42:267 which was repealed in 1983, is not relevant to this case. All evidence indicates that the disputed racial designations were not made by a public official but by the attending midwife or by the parents themselves, unaware of and unaided by the criteria of 42:267.

In reaching this conclusion, we have not lightly dismissed appellants' well-founded argument that R.S. 42:267 was constitutionally defective. To the contrary, we have recognized in the past, as we do today, that the statute was based upon wholly irrational and scientifically insupportable foundations. In State ex rel. Plaia v. Louisiana State Board of Health, 275 So.2d 201 (La.App. 4th Cir. 1973), we held that the statute was so vague as to be incapable of meaningful application. However, our decision was reversed by the Louisiana Supreme Court which held that R.S. 42:267 was neither unconstitutionally vague nor invidiously discriminatory. State ex rel. Plaia v. Louisiana State Board of Health, 296 So.2d 809 (La. 1974). While our present opinion should not be interpreted to imply that we are bound today by social and cultural precedent, we are nonetheless bound by

legal precedent. Thus, neither the Trial Court nor this court is free to declare that La. R.S. 42:267 was, during its brief and tortured existence, unconstitutional.

AFFIRMED

Armstrong, J. CONCURRING IN PART, DISSENTING IN PART.

I concur in the result reached by the majority, however, I believe that the remedy of mandamus should be available to plaintiffs and that the constitutionality of LSA-R.S. 42:267 is indeed relevant.

Although the majority is correct in pointing out that the plaintiffs themselves have not been specifically classified by the State, i.e., their birth certificates do not indicate the race of the child, I am compelled to point out that the society in which plaintiffs grew up, and perhaps to a lesser extent our present society, classify one according to ancestral designations,

"you are what your parents are." Since plaintiffs' parents were designated as "colored", plaintiffs will continue to be regarded as members of the black race by some segments of our society no matter what they proclaim themselves to be. Given this past and present reality I must disagree with the majority holding that the constitutionality of LSA-R.S. 42:267 is irrevelant.

If LSA-R.S. 42:267 is constitutional, plaintiffs could demand that their parents' racial designation be changed to white. If that statute is constitutional and the plaintiffs could prove that their parents had one-thirty second or less of "Negro blood", then the State would be in violation of LSA-R.S. 42:267 if it maintained a designation of plaintiffs' parents as colored. In my opinion mandamus should be available as a rememdy because irrespective of who provided their parents' racial designations, it is plaintiffs' birth certificates

and their hereditary racial designations which would be altered.

Regarding the constitutionality of LSA-R.S. 42:267, the Trial Judge in his reasons for judgment stated, "As to R.S. 42:267, it has already been found constitutional by our Supreme Court, in State ex rel. Plaia v. Louisiana State Board of Health, 296 So.2d 809 (La. 1974)." In that case, without subjecting the statute to strict scrutiny, the Louisiana Supreme Court reasoned that LSA-R.S. 42:267 was a definition of the term "traceable amount" and did not constitute racial classification.

I respectfully disagree. LSA-R.S. 42:267 constitutes a classification in that it prohibits persons of a certain genealogical status from being designated as black. Thus, it is immaterial that no Louisiana official is required under LSA-R.S. 42:267 to actually designate any person as black--the statute itself classifies.

As a racial classification LSA-R.S. 42:267 is "suspect" and is therefore subject to strict scrutiny. Korematsu v. United States, 323 U.S. 214 (1944); Loving v. Virginia, 388 U.S. 1 (1967); Regents of University of California v. Bakke, 438 U.S. 265 (1978). When a racial classification is clear on the face of a statute, there arises a heavy burden upon the government to prove that the statute is necessary to fulfill a compelling governmental interest. Washington v. Seattle School District No. 1, 458 U.S. 457 (1982); Loving v. Virginia, supra. In this case the State has proposed no compelling governmental interest for the use of this statute. Nor do I choose to supply such an interest. Under these circumstances it is clear that the statute must fall as a violation of the equal protection clause.

I concur with the portion of the majority decision which holds that the Guillory sisters failed to establish by a preponderance of the evidence that their parents were white. A review of the record indicates that they simply failed to meet their burden of proof.

With regard to Adam Rogeau, the record is devoid of any evidence regarding his parent's racial designation. Since no evidence was presented to rebut the presumption contained in LSA-R.S. 40:42(A) that the racial designation in the birth certificate is correct, I would rely on that presumption and would hold that the designation is correct.

Nor is Mildred Rogeau entitled to have a birth certificate issued. No evidence was presented at trial to establish her birth record. Consequently I must agree with the Trial Court's refusal to issue a birth certificate to her.

For the foregoing reasons I respectfully concur in part and dissent in part.

ON REHEARING

Appellants challenge, on equal protection grounds, the constitutionality of La. R.S. 40:34(A)(1)(k) which requires the race or races of parents to be inlcuded on all birth certificates. We find that this requirement does not infringe on appellants' constitutional rights. The statute does not result in racial classifications being made by the State; the state registrar of vital records is merely the custodian of information reported by the individuals whose race is recorded. Moreover, racial data, which is treated as confidential information and is not listed on certified copies of birth certificates, serves an important governmental purpose. It provides statistics which are an essential tool for planning and monitoring public health programs, affirma-

tive action and other anti-discrimination measures.

The judgment of the Trial Court is affirmed.

JANE DOE, et al

VS. NO. 86-C - 0128

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HEALTH &
HUMAN RESOURCES, OFFICE OF
VITAL STATISTICS AND
REGISTRAR OF VITAL
STATISTICS

---

IN RE: Doe, Jane; Rougeau, Theresa Guillory; Rougeau, Regina; Rougeau, Tex Adam; Rougeau, Marie (Mary) Guillory; Fontenot, Armet Guillory; Parker, Lucy Guillory; Phipps, Susie Guillory; Rougeau, Mildred; Applying for Writ of Certiorari and/or Review, Writ of Mandamus; to the Court of Appeal, Fourth Circuit, Number CA-1120; Parish of Orleans Civil District Court Div. "D" Number 78-9513, 81-4201

---

March 31, 1986

DENIED.

PFC

WFM

FAB

HTL

WATSON, J., concurs in the denial for the reasons assigned by the Court of Appeal on reharing.

APPENDIX "C"

DIXON, C.J., & DENNIS, J., would grant the writ.

Supreme Court of Louisiana
March 31, 1986

/§/ Frans J. Labranche, Jr.
Clerk of Court
For the Court

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 78-9513 c/w 81-420 DIVISION "D" DOCKET NO. 5

JANE DOE, ET AL

VERSUS

THE STATE OF LOUISIANA THROUGH THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES, OFFICE OF VITAL STATISTICS AND REGISTRAR OF VITAL STATISTICS

FILED: April 30, 1986 _____
DEPUTY CLERK

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that each and all plaintiffs and appellants, "Jane Doe, et al" (Susie Guillory Phipps; Theresa Guillory Rougeau; Regina Rougeau; Tex Adam Rougeau; Marie (Mary) Guillory Rougeau; Armet Guillory Fontenot; Lucy Guillory Parker; Mildred Rougeau), appeal to the Supreme Court of the United States from the final decision of the Supreme Court of the State of Louisiana, rendered on 31 March 1986, denying their application for a writ of certiorari and/or review and writ of

mandamus, and affirming the opinion of the Court of Appeal, 4th Circuit, State of Louisiana.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Respectfully submitted,

/§/ Earl A. Maxwell
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ATTORNEYS FOR PLAINTIFFS AND APPELLANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been forwarded to all counsel of record by depositing a copy of same in the United States may, postage prepaid and properly addressed, this 30th day of April 1986.

/§/ Earl A. Maxwell
BRIAN M. BEGUE
EARL A. MAXWELL

THE SUPREME COURT FOR THE STATE OF LOUISIANA

JANE DOE, ET AL

VERSUS NO. 86-C-0128

THE STATE OF LOUISIANA THROUGH
THE DEPARTMENT OF HEALTH AND
HUMAN RESOURCES, OFFICE OF
VITAL STATISTICS AND
REGISTRAR OF VITAL STATISTICS

FILED: April 30, 1986 /§/Frans J. LaBranche,Jr.
DEPUTY CLERK

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that each and all plaintiffs and appellants, "Jane Doe, et al" (Susie Guillory Phipps; Theresa Guillory Rougeau; Regina Rougeau; Tex Adam Rougeau; Marie (Mary) Guillory Rougeau; Armet Guillory Fontenot; Lucy Guillory Parker; Mildred Rougeau), appeal to the Supreme Court of the United States from the final decision of the Supreme Court of the State of Louisiana, rendered on 31 March 1986, denying their application for a writ of certiorari and/or review and writ of

mandamus, and affirming the opinion of the Court of Appeal, 4th Circuit, State of Louisiana.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been forwarded to all counsel of record by depositing a copy of same in the United States may, postage prepaid and properly addressed, this 30th day of April 1986.

/§/ Earl A. Maxwell
BRIAN M. BEGUE
EARL A. MAXWELL

MOT

TION

Supreme Court, U.S.
FILED
NOV 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

# NO. 85-2147

# In the Supreme Court of the United States

OCTOBER TERM, 1986

JANE DOE, ET AL

Appellants

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES, OFFICE OF VITAL STATISTICS AND REGISTRAR OF VITAL STATISTICS

Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

## MOTION TO DISMISS OR TO AFFIRM

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

NO. 85-2147

JANE DOE, ET AL

Appellants

VERSUS

STATE OF LOUISIANA,
THROUGH THE DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
OFFICE OF VITAL STATISTICS AND
REGISTRAR OF VITAL STATISTICS

Appellees

## MOTION TO DISMISS OR TO AFFIRM

The Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, respectfully move this Honorable Court to dismiss the above entitled appeal or, in the alternative to affirm the judgment of the Supreme Court of the State of Louisiana on the grounds hereinafter set forth.

## I. THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

### A. The Statute on Its Face

This appeal questions whether a Louisiana statute requiring "race of parents" data to be entered on birth

certificates is, as applied, a denial of equal protection of the law or a denial of due process of law.

The subject law is Louisiana Revised Statute 40:34A(1) (k), which, at the time the litigation began and at the time of the trial, read in pertinent part as follows:

> "§ 34. Vital records forms
>
> A. The certificate forms prescribed by the state registrar shall include, as a minimum, the items listed below and any others recommended by the national office in charge of gathering vital statistics. Only these forms shall be used in registering, recording, and preserving the vital information required by this Chapter. These forms shall be typewritten in black type or written in jet black ink. The forms shall be printed and supplied by the state registrar and the required contents are:
>
> (1) Contents of birth certificate. The certificate of birth shall contain, as a minimum, the following items:
>
> (a) Full name of child.
>
> **********
>
> (j) Respective age of parents on their last birthday, in years.
>
> (k) Race or races of parents.
>
> **********"

This statute was amended by Act No. 786 of 1986 of the Louisiana Legislature, such that R.S. 40:34 A(1)(k) now reads as follows:

> "(k) Race or races of parents as reported by the parents"

Prior to 1980 the Louisiana birth record forms provided by the state registrar of vital records and distributed to the various public and private hospitals throughout the state contained spaces for the "race of parents" data to be entered on the upper portion of the certificate which is reproduced whenever a certified photocopy of the birth record document is made, such as when requested by the birth registrant's parents or the birth registrant personally.

Since 1980 the "race of parents" data is entered on spaces located on the lower portion of the revised record form which is not reproduced whenever a certified copy of the birth record is made at the request of an authorized party.

The Appellants who have birth records in the custody of the state registrar of vital records were all born prior to 1980.

B. The Statute As Applied

Periodically, the state registrar of vital records distributes birth record forms to the various public and private hospital facilities throughout the state accompanied by instructions in accordance with guidelines recommended by the national office in charge of gathering vital statistics.

The information obtained pursuant to LSA-R.S. 40:34A (1)(k) is converted into statistical data without any individual identification in accordance with Act No. 638 of 1975 of the Louisiana Legislature, which reads as follows:

> "Be it enacted by the Legislature of Louisiana
>
> Section 1. The public policy of the state of Louisiana is to accord equal protection under the laws of this state to all citizens without regard to race, creed, color or national origin.
>
> Section 2. Statistics pertaining to race, creed, color or national origin may be gathered by the agencies of the state and local governments provided such statistics are not used for the purpose, nor do they have the effect, of fostering unequal treatment or protection under the laws."

The statistical data without identifying information is used for public health planning and is submitted periodically to the national office in charge of gathering vital statistics and by that office to the U.S. Census Bureau to supplement its records between census years, etc.

## C. The Proceedings Below

A group of closely related members of a Southwest Louisiana family filed a mandamus action in 1978 in Civil District Court for the Parish of Orleans, State of Louisiana, to obtain racial designation "corrections" from "colored" to "white" for each of their respective parents as originally recorded on their birth certificates on information furnished by midwives. Two of the original petitioners, upon discovering that their births had not been recorded,

remained in the case in order to establish their birth registrations with "white" designations consistent with their co-petitioning relatives' contentions.

In an alternative demand for declaratory judgment, the Appellants challenged the constitutionality of LSA-R.S. 40:34A(1)(k) so as to prohibit the gathering of "race of parents" data on birth record forms in Louisiana.

Three days of much publicized trial proceedings resulted in a judgment rejecting the petitioners' demands in full. An appeal was timely filed in the Fourth Circuit Court of Appeal for the State of Louisiana, which affirmed the trial court judgment as reported in *Doe v. State, Department of Health and Human Resources,* 479 So.2d 369 (La. App. 4 Cir. 1985). A Writ application was thereafter denied on March 31, 1986 by the Supreme Court of the State of Louisiana and is reported in 485 So.2d. 60 (La. 1986).

## II. ARGUMENT

a) This appeal presents no substantial federal question warranting review by this Court.

Appellants' Jurisdictional Statement suggests erroneously that "(t)he substantial question before this Court is whether or not Louisiana's methodology, which classifies those with a traceable amount of negro blood as negro and yet does not classify those with a traceable amount of white blood as white, is acceptable under the present status of the law". Jurisdictional Statement, pp. 15-16.

Nothing in the record of this case establishes the imagined methodology of racial classification by the State referred to in the Appellants' Jurisdictional statement.

The record does not contain any evidence that even remotely suggests or infers that any kind of suspicious state action was involved in the process of recording the information reported by the midwives on the Appellants' birth certificates.

To the contrary, the record suggests that the "race of parents" entries in question correctly reflected the subjective beliefs of the Appellants' parents, as understood by the midwives. This conclusion has abundant support in the voluminous school records, federal census records, church records, and in the testimony of three elderly and very closely related members of the Appellants' family, and in the testimony of neighbors in the rural community where the Appellants were born, all introduced into the evidence of this case by the Appellees.

The Appellants' Jurisdictional Statement proceeds to refine the erroneous substantial question alleged to be involved in this case by additionally suggesting that "(i)ndeed, the question becomes whether or not the Louisiana Vital Records Law stigmatizes a discreet minority as inferior and perpetuates past discrimination". Jurisdictional Statement, p. 16. Just how the subject statute allegedly stigmatizes and discriminates is not established anywhere in the record.

As concerns the Appellants' birth certificates, the record more accurately suggests that none of the Appellants even knew that their birth records were in the custody of the state registrar until the principal litigant was seeking a passport in 1977. This suggestion is further supported by the school records which show that birth facts entered on the school records were obtained from "parental statements" and not from birth certificates. Likewise, the church baptism records concerning the Appellants which reflect "colored" racial designation marginal entries, were not influenced by the birth records. Neither were the federal census records influenced by the birth records.

The record simply does not contain the established facts needed to support the substantial federal question assertions and contentions in the Appellants' Jurisdictional Statement. There is no substantial federal question in this case, and plenary consideration is neither appropriate nor warranted.

b) This case was decided on adequate non-federal grounds.

The record reflects that the Appellants, primarily through the efforts of the principal litigant (the only one of the Appellants who attended and testified at the trial) had very ample opportunity to present evidence in support of their fundamental contention that the "race of parents"data as recorded by the midwives was incorrect, so as to justify the desired alterations from "colored" to "white".

The record shows that the Appellants failed to prove that the recorded entries, which had never been altered at

any time, were incorrect at the time each birth event was registered.

As concerns present day birth registration procedures, the record further contains the testimony of the state registrar of vital records and of the medical records librarian of Charity Hospital of Louisiana at New Orleans. Both were called to the witness stand by the Appellants' counsel, and their testimony establishes that the state's instructions to the hospital clerical personnel responsible for completing birth records are explicit relative to obtaining the "race of parents" information from the parents of newborn infants. In other words, there is no state action of racially classifying the parents ... they classify themselves according to their own subjective beliefs.

c) The standing requirement needed for the adjudication of cases in Federal Courts has not been met.

A basic prerequisite for allowing a litigant to invoke the powers of Federal Courts is that the litigant has standing to prosecute the action in question. *Worth v. Sedin*, 442 U.S. 490, (1975). The standing requirement is dictated by the provisions of Article III of the Constitution which confines the Federal Courts to adjudicting actual cases and controversies. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.* 454 U.S. 464, (1982). In order to establish standing a plaintiff must allege personal injury fairly traceable to the defendants' allegedly unlawful conduct and must show that the injury is likely to be redressed by the requested relief. *Valley Forge*, supra, at 454 U.S. 472. The alleged injury must be to the plaintiff and not to some third party. Further, the

injury cannot be too abstract to be considered judicially cognizable and finally, the prospect of obtaining relief as a result of a favorable ruling must not be too speculative. *Allen v. Wright*, 468 U.S. 737, (1984).

Appellants have failed to allege or show any injury whatsoever to themselves or to anyone else because of the failure of the defendants to alter birth certificates changing the racial designation of their parents from "colored" to "white". The record is totally devoid of any evidence to show that any of the plaintiffs suffered because of the designation placed on the certificates. Further, if any conceivable injury could exist as a result of an alleged erroneous designation of race, that injury would be to the person whose race is in question. In this case, the certificates only list the race of the parents, not the child. Therefore, any conceivable injury would have been to the Appellants' parents. Appellants clearly have no recognizable right to challenge the information recorded concerning their parents, particularly in the absence of any evidence that the parents considered the information on the birth certificates erroneous.

Assuming arguendo that injury to the Appellants could be established, the evidence clearly shows that the information contained on the birth certificates was supplied by the various midwives attending the various birth events. The defendant state registrar only acted as the custodian of these certificates. Thus any alleged error in the records is attributable to the midwives, not the Appellees. Thus the requirement of the injury being traceable to the defendants' alleged conduct is not met.

Finally, a ruling on the constitutionality of R.S. 40:34 A(1)(k) could only result in the removal of the parents'

racial designation from the birth certificates of the Appellants. This relief has been available to the Appellants since 1979 when the Legislation made provisions for the issuance of short form birth certificates which could be used as proof of age.

R.S. 40:39 provides as follows:

> "§ 39. Issuance of short form birth certification cards; exception provided for
>
> A. The state registrar shall issue short form birth certification cards containing a true certification of name and birth facts as recorded on the original documents on file in the vital records registry, and for use as legal proof of the recorded facts of birth for all purposes.
>
> B. Racial designation shall not be reflected on the short form birth certification card, unless expressly required by the Applicant.
>
> C. An applicant requesting the issuance of the 'long form' certified photocopy of the original birth record in lieu of the 'short form birth certificate card' may obtain it by submitting an application and appropriate fee."

Since Appellants are already capable of obtaining a birth certificate omitting racial designations, a ruling on the constitutional issues sought to be raised is completely unnecessary.

## III. CONCLUSION

The Appellees' motion to dismiss the appeal, or in the alternative to affirm the Supreme Court of the State of Louisiana should therefore, be sustained.

Respectfully submitted,

H. M. Westholt, Jr.